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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PORSCHE FINANCIAL SERVICES,

Plaintiff and Respondent,

v.

SHIU LIT KWAN,

Defendant and Appellant.

B168645

(Los Angeles County
Super. Ct. No. GC029467)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Jan A. Pluim, Judge. Affirmed and remanded with directions.

Armen L. George for Defendant and Appellant.

Law Offices of Beck & Browning and Robert W. Beck for Plaintiff and
Respondent.

A Porsche was leased for 36 months but returned early. The car was sold by the lessor's assignee, who then sued the lessee for the difference between the amount due by reason of the termination of the lease. The assignee prevailed, and the lessee appeals. We affirm.

FACTS

A.

In August 2000, Shiu Lit Kwan leased a Porsche from Reeves Import Motorcars, Inc., a Florida dealership that delivered the vehicle to Kwan in Los Angeles and later assigned the lease to Porsche Financial Services (PFS). Kwan agreed to pay \$1,388.89 per month for 36 months (\$50,000), but stopped making payments in December, claiming the car was defective and asking PFS to repossess it, which it did, then sold it in March 2001 for \$62,000. After calculating the early termination penalty as provided in the lease, accumulated late charges, and the expenses of sale, PFS notified Kwan that he owed \$11,934.29 under the lease.¹

In June 2001, PFS sued Kwan for breach of the lease. In its first amended complaint (filed in August), PFS alleged that all required notices had been given, that its demands had been ignored, and that interest was due (and continuing

¹ The lease gave Kwan the right to terminate early but also provided that, if he elected to terminate before the end of the term and did not exercise his right to purchase the Porsche, he would have to pay "a substantial charge" that might "be up to several thousand dollars," depending upon the date of early termination, and that the earlier he ended the lease, the greater this charge would be. The lease shows the gross capitalized cost of the vehicle as \$75,411.08. And although the lease provided that only Kwan and his spouse were authorized drivers, Kwan had in fact leased the car for his son's use, and his son (Cho Yiu Kwan) was, with only a few exceptions, the exclusive driver of the Porsche.

to accrue) on the deficiency. In November, Kwan's demurrer to the amended complaint was overruled and he was ordered to answer within 10 days.

On January 2, 2002, Kwan (who had yet to answer PFS's complaint) cross-complained against PFS for breach of contract, misrepresentation, fraud, unfair trade practices, unfair debt collection practices, and emotional distress.² Kwan alleged that he had leased a "new Porsche" but the one delivered to him was either used or defective and the Porsche-trained mechanics were unable to repair it "under the warranty provided." He alleged that he had returned the Porsche and demanded rescission of the lease, and that he now wanted to be reimbursed for the payments he had made under the lease. On February 11, Kwan answered PFS's amended complaint, raising 14 affirmative defenses.

PFS demurred to Kwan's cross-complaint, challenging all six causes of action on the grounds of uncertainty and failure to allege facts sufficient to constitute a cause of action. On June 21, over Kwan's opposition, the trial court sustained the demurrer with 15 days leave to amend and sent notice of its ruling to both parties. Kwan did not file an amended cross-complaint within the time allowed and, on July 19, PFS asked the trial court to dismiss Kwan's cross-complaint based on his failure to file an amended pleading. Although PFS's request for dismissal was served by mail on the same day it was filed (July 19), and although Kwan's lawyer lives in Washington, the trial court signed and filed

² Kwan's cross-complaint also named Reeves Import Motorcars, Inc., and Porsche of North America as cross-defendants, but it appears these entities were never served.

an order of dismissal on July 22. On July 26, PFS served Kwan with notice of entry of the order dismissing his cross-complaint.

B.

In October, Kwan sent out a notice of the deposition of PFS's "person most knowledgeable" about a variety of topics, but PFS objected and the deposition was not held.

On November 12, PFS filed a motion for summary judgment, presented evidence to establish the elements of its breach of contract claim, and contended that Kwan's efforts to excuse his breach lacked merit because they were, in essence, claims for breach of a warranty that could be asserted only against the manufacturer, and not against PFS or its assignor -- because the lease stated that the only warranty was "the standard manufacturer's new vehicle warranty," that the lessor made "no warranties or representations, either express or implied as to the Vehicle or any part or accessory thereof," and that the lessor made "no warranty of merchantability or fitness of the Vehicle for any particular purpose or any other representation or warranty whatsoever."

On November 22, Kwan filed a motion to compel the deposition he had tried to schedule in October, and set the hearing for December 16, the same day as the hearing on PFS's motion for summary judgment. On December 2, Kwan filed his opposition to the summary judgment motion, claiming it was PFS's duty to show there was no merit to Kwan's affirmative defenses (Code Civ. Proc.,

§ 437c, subds. (a), (f)(1)),³ contending there was additional evidence to be considered before ruling on PFS's motion, and asking the court to either deny the summary judgment motion or continue the hearing so Kwan could obtain the deposition testimony he needed. (§ 437c, subd. (h).)

On December 16, the trial court continued the summary judgment hearing to January 17, 2003, and authorized Kwan to file additional papers explaining the relevance (vis-à-vis the summary judgment motion) of his proposed discovery. Kwan complied, and PFS responded.

On January 17, the trial court (by failing to rule) denied Kwan's motion to compel the deposition of the "person most knowledgeable" and granted PFS's motion for summary judgment. PFS's subsequent motion for attorney's fees was granted, and a judgment was entered in favor of PFS, ordering Kwan to pay \$11,934.29, plus interest, plus costs and attorney's fees (\$32,942.75).⁴ Kwan appeals from the judgment.

DISCUSSION

I.

Kwan contends the trial court should not have dismissed his cross-complaint. We agree that the order of dismissal was prematurely entered (§§ 1013, 581, subd. (f)(2); Cal. Rules of Court, rule 379(e), (f); *Datig v. Dove*

³ Undesignated section references are to the Code of Civil Procedure.

⁴ The lease provides that, upon the lessee's early termination and a resulting dispute, the lessor is entitled to recover its attorney's fees.

Books, Inc. (1999) 73 Cal.App.4th 964, 976-977; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶¶ 7:150 to 7:150a, p. 7-55), but find the error harmless.

Had the dismissal not been entered when it was, Kwan might have been permitted to file an amended cross-complaint -- but he concedes in his brief on appeal that it would have been "futile" for him to do so. According to Kwan, this futility arises from the trial court's "views respecting Kwan's right to proceed directly against [PFS] for defects in the Vehicle or deficiencies in the lease transaction," and he thus ought to have the dismissal vacated "if it would have been possible under any reasonable interpretation of the facts . . . for Kwan to have stated a cause of action against [PFS]." Unfortunately, Kwan has not shared with us his theory about his right to proceed directly against PFS for breach of a manufacturer's warranty, and he has not offered any evidence (or even alleged any specific facts) to support his assertion that the Porsche was used, not new.

Under these circumstances, we must affirm the dismissal if the unamended cross-complaint is objectionable on any ground raised by PFS's demurrer. (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.) We note that here, as above, Kwan has made no effort to support his position, and has not attempted to show that his unamended pleading was adequate. We nevertheless explain, albeit briefly, that the demurrer was properly sustained, and the dismissal order thus was proper.

Although PFS is the assignee of Reeves Import and thus "subject to all equities and defenses of the lessee against the lessor" (Civ. Code, § 2986.10),

Kwan's cross-complaint alleges only that the lease was breached when Reeves Import gave him a "used and/or defective" Porsche instead of the "new" one required by the lease -- making it impossible to determine whether he was alleging a claim under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.) or a simple breach of the lease. As a result, the pleading was ambiguous and subject to demurrer. (*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104.)⁵

Kwan's misrepresentation claim fails because he did not allege that the representation by Reeves Import (that the Porsche was new) was made without a reasonable basis for believing it to be true, and he did not allege that the representation was made with the intent to induce Kwan's reliance. (*Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal.App.3d 1277, 1285.) Kwan's separate fraud claim fails because he does not allege an intent to defraud. (*Ibid.*)

Kwan's unfair trade practices claim (Bus. & Prof. Code, § 17200 et seq.) fails because it was alleged against Porsche of North America, not against PFS, and Porsche of North America was never served and is not a party to these proceedings -- and also fails because the pleading does not describe the alleged "unlawful, unfair or fraudulent" business practice. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179-180.) Kwan's unfair debt collection practices claim fails because it does

⁵ In opposition to PFS's motion for summary judgment, Kwan presented his son's declaration in which he lists the dates the car was in the shop for service. Although the declaration refers to various exhibits, including service orders, none are attached to the declaration.

not describe the offending conduct or the "California and federal law" or statutory scheme upon which he relies.

Kwan's claim for "emotional distress" fails because he does not say whether he is seeking damages for negligence or on an intentional tort theory; if intentional, the cause of action is insufficient because he does not allege outrageous conduct or the required intent; if negligent, it fails because no duty is alleged. (*Carney v. Rotkin, Schmerin & McIntyre* (1988) 206 Cal.App.3d 1513, 1524-1525.)

It follows that the demurrer to the cross-complaint was properly sustained.

II.

Kwan contends the trial court should have denied PFS's motion for summary judgment, on the theory that PFS had to not only establish Kwan's breach, but also show that Kwan had no defense to the action. Although Kwan is correct in the abstract (§ 437c, subd. (a); Civ. Code, § 2986.10), he is wrong when he claims that PFS failed to meet its burden.

PFS's evidence shows that Kwan agreed to lease a certain "new" Porsche with an odometer reading of 582 miles and a vehicle identification number of WPOAA2996YS622259. Kwan alleged that Reese Imports failed to deliver a "new" Porsche, but "new" or "used" was not the issue -- it was undisputed that the car described in the lease was the car that was delivered. Moreover, Kwan did not offer a declaration to show that the status (new or used) of the Porsche was materially changed prior to delivery, for example, by a greater odometer reading.

And although Kwan claimed the vehicle had problems and his son's declaration, generously construed, supports that claim (but without the exhibits supposedly attached to the son's declaration), Kwan's argument ignores the fact that, under the lease, he was "responsible for the maintenance and servicing of the Vehicle," and he had "agree[d] to pay the cost of maintenance, repair and operating expenses." In any event, there is no evidence to suggest that Kwan had to pay for any repairs; to the contrary, it appears they were covered by the standard manufacturer's warranty recited in the lease.⁶

To avoid this result, Kwan claims he is not liable for the deficiency from the sale of the vehicle following his early termination of the lease because he never received a copy of the lease and thus did not know about this provision, and because he does not speak or read English. We disagree. The evidence establishes that the lease was sent to Kwan's employee and interpreter (Wei Wei "George" Chang), who checked the "price and duration terms" that he had negotiated for Kwan but did not translate the entire lease for Kwan, and who made a copy of the front of the lease but not the back.⁷ Having empowered Chang to act as his agent, and given Chang's admission that he read the lease -- plus the fact that Kwan signed the lease and accepted delivery of the

⁶ This is not to say that Kwan could not have established that the car was entirely unfit for its intended use, or that the manufacturer was liable for the cost of repairs on some other theory. The point is, he did not present evidence of a defect or anything more than minor problems, and he did not discuss the distinction between his position as a lessee and the usual position of a purchaser. (See e.g., Civ. Code, § 1790 et seq.)

⁷ The following was stated just above the signature line on the front of the lease: "You agree to all provisions of this lease including those on the reverse side hereof which are incorporated herein by reference."

Porsche -- there simply is no merit to these arguments. (Civ. Code, §§ 2330, 2332; *Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 630.)

Accordingly, PFS's motion for summary judgment was properly granted.⁸

III.

Before the case was resolved by summary judgment, the trial court imposed discovery sanctions against Kwan. Kwan claims the sanction orders were improperly imposed. We disagree.

In late 2001, Kwan filed a motion to compel discovery. In December, the trial court denied the motion on procedural grounds. Kwan filed two similar motions, with hearings set for January 10, 2002 -- at which time the trial court denied both motions and ordered Kwan and his lawyer (who failed to appear at the hearing) to pay \$3,000 to PFS as sanctions, \$1,500 for each motion. Kwan then filed a motion for relief from the January 10 order (§ 473), with his lawyer presenting evidence that he had told PFS's lawyer on December 27 that he would not pursue the motions. According to Kwan's lawyer, he failed to call the trial court to take the matter off calendar and, unbeknownst to him, PFS appeared and requested sanctions; had he known PFS would seek sanctions,

⁸ Our rejection of Kwan's challenge to the validity of the lease makes it unnecessary to address his contention that there was no basis for the award of attorney's fees. As noted above, the lease provided for an award of attorney's fees. We also reject Kwan's contention that the amount of fees awarded was unreasonable. PFS incurred fees of about \$42,000, and submitted records to substantiate its claim for that amount. The record demonstrates that the trial court reviewed the records, questioned PFS's lawyer about his billing rates and about some items that were not clearly explained, then awarded \$30,000 in fees. There was no abuse of discretion, and there is no showing at all to support Kwan's conclusory assertion that the fees were "double[d]" or otherwise "unreasonable."

he would have had someone appear for him to explain that he had told PFS before opposition to the motions was due that he was not going to pursue the motions. The trial court granted the motion in part and reduced the sanction award to \$1,500.

Given Kwan's failure to notify the court that he did not intend to pursue the motions, and given his failure to provide documentation to PFS to establish that the motions had, as promised, been taken off calendar, we find no abuse of discretion in an award of \$1,500 in sanctions. (§ 2019, subd. (b)(2), 473, subd. (b).)

DISPOSITION

The judgment is affirmed. PFS is awarded its costs of appeal, including attorney's fees, and the cause is remanded to the trial court with directions to determine the amount of fees on noticed motion.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

SUZUKAWA, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.